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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. HAROLD L. GIPSON, Defendant and Appellant.	A130887 (Solano County Super. Ct. No. VCR-189342)

Defendant was convicted following a jury trial of first degree murder (Pen. Code, § 187) with personal use of a firearm in the commission of the murder (Pen. Code, § 12022.53).[1] He claims in this appeal that admission of prior inconsistent statements of witnesses without adequate indicia of reliability violated his right to confrontation. We conclude that the admission of the pretrial statements of witnesses who appeared and testified at trial was not error, and affirm the judgment.

STATEMENT OF FACTS

The victim, Michael Sample, was shot and killed near a pedestrian gate of a building in the Marina Vista Apartments in Vallejo, a "low-income" apartment complex associated with "lots of reports" of shootings, violence, robberies and narcotics trafficking. Officers of the Vallejo Police Department responded to a report of the

[1] Defendant was tried twice on the murder charge. In the first trial, the murder charge case was consolidated with a separate attempted murder charge. The jury found defendant guilty of attempted murder, but was unable to reach a verdict on the murder charge. Following a second trial defendant was found guilty of murder and the associated firearm use enhancement.

shooting at around 8:00 p.m. on January 10, 2006. A group of "Black" males and females were carrying Sample, but placed him on the street next to a silver Chevy Impala when the police arrived. Sample was not breathing and had no pulse. He was transported by paramedic personnel to the hospital, where he was pronounced dead. The autopsy disclosed that the victim died from a bullet that entered the right side of his chest and penetrated his heart. The absence of strippling on the body indicated that the shot was fired from at least two feet away.

Examination of the scene of the shooting resulted in the discovery of a total of five expended 9-millimeter shell casings: two next to a maroon car parked on the street 15 to 20 feet north of the pedestrian gate, and three others on the sidewalk near a wrought iron fence that surrounded the apartment complex. Three baggies that appeared to contain rock cocaine were found in front of the pedestrian gate.

After the police arrived, most of the group of people dispersed, but four or five of them stayed at the scene. One of the officers asked "who had shot the guy," but no one responded, although someone pointed to the location where the shooting occurred. The owner of the silver Chevy Impala, Ranika Sterling, and her boyfriend Clyde Moore, remained at the scene of the shooting. They were transported to the police station for questioning by detectives.

Defendant's conviction was based primarily on a procession of witnesses who gave statements to the police, but did not offer any evidence at trial that they observed defendant fire the shots at Sample. The witnesses gave varying and often inconsistent accounts of the shooting or their observations in their pretrial statements to the police and later in testimony presented at the first and second trials in the case.[2]

Ranika Sterling was twice questioned by Detective Mathew Mustard, the first time a few hours after the shooting, then again a day or two later at her request. Her two statements to the police were not internally inconsistent. Sterling lived at the Marina Vista Apartments with Moore, and was acquainted with both defendant and the victim.

[2] Our references to the testimony presented at trial is to the second trial that resulted in the convictions under review in this appeal.

She stated that after returning to her apartment from the Laundromat she heard three to five gunshots and a commotion on the street. A minute or so later she proceeded to the street and discovered that the person who had been shot was her friend Sample. She assisted others with an effort to carry Sample to her car to be transported to the hospital. Just as they reached the door of her car the police arrived and advised the group carrying Sample to "put the body down." Sterling was then transported by the police to the station for questioning. During her second interview with Detective Mustard, Sterling added that defendant's close friend Ronar Inocencio, known as "Reno," was with Sample just before he was shot. After the shooting Sterling overheard Reno state to Moore that he "tried to stop what had happened," and "was sorry for what had happened, and that Mr. Gipson is the person that had killed Mike Sample." Sterling also offered information that defendant's girlfriend was named "Jemina," and drove a beige Isuzu. Sterling repeatedly expressed to the police that she was concerned for her safety, and asked to remain anonymous in the case.

At trial, Sterling essentially reiterated her account of the shooting and its immediate aftermath. She did not recall much of the content of her interviews with Detective Mustard, including telling him she overheard Reno state that defendant killed Sample.

Vallejo police officers testified that about two weeks after the shooting they were present at a neighborhood memorial erected for Sample on the sidewalk near the Marina Vista Apartments. An African-American woman who fit Sterling's description dropped a folded note on the ground as she passed close to the officers, before walking into the apartment complex. The note, which was given to Detective Mustard, again requested anonymity, and stated that the suspect "in question" in the case could be found at the "Vallejo Inn with Jemina." Jemina Perryman was identified as defendant's girlfriend when the shooting occurred; she regularly drove her mother's 1999 silver Isuzu Rodeo. Sterling testified at trial that she attended the memorial for Sample, but denied that she left a note for the officers who were present.

Clyde Moore was also questioned by detectives the night of the shooting, and provided a version of events that fundamentally matched that given by Sterling. Nearly a week later Moore was arrested for possession of a handgun. In an effort to "negotiate with the police" he requested to meet with Detective Mustard to "provide additional information" on the murder of Sample. Moore recounted for the detective a previous conversation with Reno, who told him that he was "present when the murder occurred." According to Reno, Sample slapped defendant during an altercation; defendant then "pulled a gun . . . and shot Mr. Sample." Moore was "wired up" and instructed to meet with Reno to attempt to obtain a recorded statement. During their conversation Reno reiterated that he attempted to stop the shooting, and "did not want anybody to get hurt."

When Moore was arrested again in June of 2008 for possession of a firearm, he advised the arresting officers that he was "a witness" in the "Harold Gipson" murder case, and wanted to provide information to "get out of going to jail that day." Moore told the officers he previously "lied in the case" when he stated he "was in the hallway" and did not observe the shooting. He stated that he "had really seen" defendant "walking away after the shots were fired."

At trial, Moore remembered almost nothing of the events surrounding the shooting of Sample, or any other facts of his life for that matter. He denied living in the Marina Vista Apartments with Sterling. He did not recall anything about Sterling, visiting the Marina Vista Apartments, hearing the gunshots, speaking with officers thereafter, telling them that Reno talked to him about the shooting, or even knowing Reno. Basically, Moore's testimony may be distilled to his repeated assertion, "I don't recall nothing."

Other witnesses gave statements to the police that did not entirely correspond to their testimony at trial. Calveda Daniels testified that she lived at the Marina Vista Apartments and had known the victim all her life. On the night of the shooting of Sample, Daniels was waiting at a bus stop on Marin Street three blocks from the apartment complex with her sister Bessie and a friend, Maurice Brewer. She observed defendant walk past the bus stop toward the Marina Vista Apartments. Defendant was talking on his cell phone, "screaming and yelling." Daniels heard defendant yell, "Are

you going to give me my shit?" He continued walking in the direction of the apartment complex. Daniels subsequently heard gunshots "coming from towards the apartments," although at trial she was uncertain of the length of time that passed between her observation of defendant and the shots.

Daniels was interviewed twice by the police in January of 2006, the second time after she was arrested on an outstanding warrant. During the first interview she was uncooperative. During the second interview with Detective Mustard she provided more information. Daniels stated that she was at the bus stop "selling dope" when she observed defendant walk past, talking "very loudly into the phone." Defendant yelled, "I want my shit. And if you don't give me my shit, we're going to have a problem." He then ran toward the Marina Vista Apartments south of the bus stop. Soon thereafter, Ryan Daniels, a man known to her as Cudha, appeared at the bus stop and told her that "guys" at the apartment were taking ecstasy, and "somebody has got a gun." Fifteen or twenty minutes after defendant passed her, Daniels heard several gunshots from the direction of the Marina Vista Apartments.

Maurice Brewer, known as "Reese," was interviewed about the shooting of Sample in May of 2006, after he had been arrested for drug possession. Brewer told Detective Mustard that he would "help" with the investigation of Sample's murder, but wanted protection and assistance with the charges against him. Brewer was fearful of defendant's "family in jail," and had received death threats. Detective Mustard agreed to protect Brewer by putting him in an apartment or taking him to relatives in Sacramento. Brewer then disclosed to the detective that he, defendant, Sample and a few others were shooting dice at the Marina Vista Apartments on the evening of the shooting. Brewer went to buy cigarettes, then stopped at a church across from the apartments. Through the church window Brewer observed defendant and Sample talking; Sample then slapped defendant. After defendant asked Sample if he had a gun, Brewer heard shots and saw Sample fall to the ground. Brewer ran to help Sample, who had been shot through the chest. Defendant hopped into a car driven by Jemina, known as Mimi, and "they sped off." A little later, after the police left, Reno told Brewer that he gave defendant the gun,

but "didn't know he was gonna do all this shit." Brewer subsequently encountered defendant, who warned him to keep his "mouth shut." At trial, Brewer did not recall anything he said to Detective Mustard. He denied that he saw any shots fired at Sample by defendant. He denied that defendant threatened him.

Antonio Clark lived in Vallejo "on and off" during 2006. He also provided statements to the police related to Sample's murder while in custody on unrelated criminal charges against him, but suffered from impaired memory of the events at trial. After he was arrested Clark stated to a detective that just before the shooting occurred he walked past Sample on his way to a market and greeted him briefly. Sample was arguing vigorously with someone Clark did not know near the Marina Vista Apartments. Clark continued walking to the market, whereupon he heard multiple gunshots from the location of the argument. Clark expressed fear of making an identification, but ultimately selected a photograph of defendant as the man he saw arguing with Sample. After Clark made the identification he was released, and was not charged with any criminal offense.

At trial, however, Clark testified that he "heard" of Sample but did not know him. He did not know defendant; he did not recall Sample "being killed" by anyone; he did not recall identifying a photograph of defendant. He did not recall identifying anyone for the police; he did not even recall speaking with the police about the shooting. Clark also testified that he did recall hearing shots and seeing "flashes" of light, but did not see a gun. Clark asserted that he lied in his statement to the police and his identification of defendant as the shooter to obtain his release from jail, not because he feared retaliation from defendant.

Chanell Smith, Sample's former girlfriend, testified that she attended the vigil for the victim. She overheard a conversation during which someone said a "guy named Harold" shot Sample after a disagreement between them. Smith also heard that "Reno tried to stop" the shooting. She relayed to Detective Mustard the substance of the conversation she overheard.

Ronar Inocencio, a "Filipino rapper" also called by his "stage name" Reno, testified that he lived at the Marina Vista Apartments with his girlfriend Lamkia Webster

in January of 2006. He was returning from a nearby liquor store when the shooting occurred. He heard the gunshots as he entered the apartment complex gate, "and ran" to his apartment. Reno denied that he was with defendant when Sample was shot, or that he told anyone he tried to stop the shooting. Reno claimed that he had seen defendant around the apartment complex, but was not friendly with him. An examination of cell phone records disclosed that on the night of January 10, 2006, Reno called the cell phone number that belonged to defendant four times just before the shooting occurred. Reno testified that he did not recall the conversation; he did not "remember a lot of this." Reno asserted that he did not "want to be involved" in the case, and feared that his life was "in jeopardy" due to his questioning by the police and testimony at trial.

During Reno's interview with the police the day after the shooting he stated that he heard an argument as he left the apartment complex for the store, and heard gunshots when he returned. He denied knowing anything about the murder, and expressed concern for his safety.

Jovan Simms was yet another witness who provided information on the shooting in a statement to the police when confronted with his own criminal charges, then essentially recanted his statement at trial. He was friends with both defendant and Sample. Simms talked to the police after he "got arrested" for possession of a "gun and drugs," and thought he "might get a break" in his criminal case. Simms reported that defendant and Sample "didn't get along" for years, and had a conflict over a "drug-selling area" in downtown Vallejo. Simms was aware that defendant conspicuously carried a gun. The day of the shooting, Simms encountered Sample, who complained that he did not "get along" with defendant, and "got into it" with him that day. Referring to defendant, Sample told Simms "he was gonna whip his ass." Later, Simms observed defendant and Sample circle each other; defendant warned Sample, "You gonna get yours." Simms feared that something bad was "about to happen," and left. The next morning his father told him Sample had been killed. Simms stated he "knew it was" defendant who committed the shooting. Defendant subsequently said Sample was shot

because he "disrespected" him, and bragged to Simms that "won't nobody fuck with him now."

At trial, Simms testified that if he gave a statement to the police that defendant admitted the shooting, "that was a lie." He denied giving any statements to the police that associated defendant with the shooting of Sample. He never talked about who killed Sample. He did not even recall any interview with the police. Simms denied that he was fearful of defendant, but expressed to police detectives that he was "scared to testify," and "scared of being a snitch."

Evidence of defendant's interview with Detective Mustard was also presented. Defendant said he "never had any problems" with Sample, and denied that he shot the victim.

DISCUSSION

Defendant complains of the admission as "prior inconsistent statements" made during the interviews of the witnesses with the police that implicated him in the shooting. He acknowledges that established law generally authorizes "the introduction of this kind of hearsay at trial" where the witnesses appear to testify and are subject to cross-examination, but claims that in the present case the evidence lacked the requisite "sufficient indicia of reliability." Defendant points out that the prior statements "consisted of multiple layers of hearsay," were given long after the shooting, and the witnesses were in many cases motivated by their own arrests and incentive to provide the police with information to secure "release on unrelated criminal charges." He also complains that at trial the witnesses for the most part disavowed or did not recall the statements rather than admit "to perjury or that they had lied to the police," so "effective cross-examination was not possible." He argues that under *Crawford v. Washington* (2004) 541 U.S. 36, 57 (*Crawford*), without any "showing of indicia of reliability," the statements of the witnesses, particularly Sims, Clark, Brewer and Moore, were erroneously admitted in violation of his right to confrontation.

In *Crawford*, the United States Supreme Court declared that the confrontation clause of the United States Constitution bars admission of testimonial statements unless

the declarant appears at the trial or the declarant is legally unavailable and the defendant had a prior opportunity for cross-examination. (*Crawford, supra*, 541 U.S. 36, 53–54; see also *People v. Johnson* (2010) 189 Cal.App.4th 1216, 1222.) The court reiterated in *Crawford*, however, that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Crawford, supra*, at p. 59, fn. 9, citation omitted; see also *People v. Clark* (2011) 52 Cal.4th 856, 927.)

To resolve defendant's claim here, we need do nothing more than refer to the decision of the California Supreme Court in *People v. Dement* (2011) 53 Cal.4th 1, 21–24 (*Dement*), in which the defendant complained of the admission of the prior inconsistent statements of two witnesses, his fellow inmates Johnson and Martinez, to the police. As in the present case, the witnesses in *Dement* implicated the defendant in the charged murder in their pretrial statements, but at trial either did not recall or denied having made those statements during their interviews. (*Id*. at pp. 22–23.)[3]

The court concluded in *Dement* that defendant's claim of erroneous admission of the prior inconsistent statements lacked merit. (*Dement, supra*, 53 Cal. 4th 1, 23.) The court declared: "Both Johnson's and Martinez's prior statements were properly admitted because both of these individuals . . . testified. . . . When a declarant 'appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. [Citation.] It is therefore irrelevant that the reliability of some out-of-court statements " 'cannot be replicated . . . .' " [Citation.] The Clause does

[3] In *Dement*, both of the witnesses, along with defendant and the victim, were confined together in Fresno County jail. One of the witnesses stated that he heard defendant say he "was going to take care of" the victim, who "had just been put into his" cell. (*Dement, supra*, 53 Cal.4th 1, 7.) Another inmate told investigating officers during an interview that he heard "somebody calling for help, screaming 'Just leave me alone,' and . . . what sounded like a body being thrown against a wall and the toilet," then later heard the victim plead, "Somebody, please get me out of this cell," and say, "You might as well go ahead and kill me." (*Id*. at p. 9.) On direct examination, both witnesses testified that they did not know defendant, denied or did not recall having made several observations or hearing certain statements when the victim was killed, and did not recall their prior interviews. (*Id*. at p. 22.)

not bar admission of a statement so long as the declarant is present at trial to defend or explain it.' (*Crawford v. Washington* (2004) 541 U.S. 36, 60, fn. 9 [158 L.Ed.2d 177, 124 S.Ct. 1354] (*Crawford*); see *California v. Green* (1970) 399 U.S. 149, 161 [26 L.Ed.2d 489, 90 S.Ct. 1930] ['[N]one of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial.'].) The testimony by Johnson and Martinez at trial gave the jury the opportunity to assess their demeanor as they denied making or asserted lack of recollection regarding their prior statements. (*People v. Martinez* (2005) 125 Cal.App.4th 1035, 1050 [23 Cal.Rptr.3d 508]; see *California v. Green*, at p. 160.) Defendant 'received what the confrontation clause requires: a full opportunity to confront and cross-examine' Johnson and Martinez. (*People v. Stevens* (2007) 41 Cal.4th 182, 199 [59 Cal.Rptr.3d 196, 158 P.3d 763] (*Stevens*).)" (*Id*. at pp. 23–24.)

As for the defendant's contention in *Dement* that because witnesses Johnson and Martinez did not affirm their statements, they could not " 'defend or explain' them as that language is used in *Crawford*," the court concluded that "the phrase 'defend or explain' in footnote 9 of *Crawford* does not mean that when a witness denies making, or claims lack of recollection of, a particular statement, admission of the statement violates a defendant's right to confrontation. (*Crawford, supra*, 541 U.S. at p. 60, fn. 9.) This is made clear by the first sentence of the same paragraph of the footnote, which broadly states that when a declarant 'appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.' (*Ibid*.) Nothing in *Crawford* casts doubt on earlier cases holding that the confrontation clause is not violated by the introduction of out-of-court statements a witness denies or does not recall making. (*Nelson v. O'Neil* [(1971) 402 U.S. 622,] 629–630 [a defendant is 'denied no rights protected by the Sixth and Fourteenth Amendments' when a 'codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts']; *United States v. Owens* (1988) 484 U.S. 554, 555–556, 559 [98 L.Ed.2d 951, 108 S.Ct. 838] [the confrontation clause does not bar 'testimony concerning

a prior, out-of-court identification when the identifying witness is unable, because of memory loss, to explain the basis for the identification'].)" (*Dement*, supra, 53 Cal.4th 1, 24.) We do not operate as an appellate court with an assumption the United States Supreme Court overrules its precedent in such a muted fashion.

The prior inconsistent statements admitted in the present case were as reliable as those admitted in *Dement*. Cross-examination of the witnesses by the defense not only occurred, but was effective. The motives of the witnesses for making the prior statements were subject to exploration, as were the ostensible causes for their inability to recall the statements at trial, and their reasons for reluctance to testify or the changes in their testimony. The direct testimony and extensive cross-examination of the witnesses at trial provided the jury with a meaningful basis for evaluating the credibility of the witnesses. No more was constitutionally required. (*People v. Clark* (2011) 52 Cal.4th 856, 927.)

Defendant's claim that his due process rights were contravened by a conviction based on the "prior unsworn statements" of witnesses, is contrary to existing established law. Unless and until the high court alters its position, we apply the long-standing principle reiterated in *Crawford* and find that the evidence was properly admitted. (*People v. Redd* (2010) 48 Cal.4th 691, 730–731.) Counsel here would do well to acknowledge such understanding of our appellate jurisprudence.

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Margulies, Acting P. J.

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Banke, J.